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In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Wisconsin

BRIEF OF AMICI CURIAE ON THE MERITS IN SUPPORT OF WISCONSIN DEPARTMENT OF REVENUE BY THE STATE OF IOWA AND THE STATES OF ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT AND VIRGINIA

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.3, the signatory states submit this brief as Amici Curiae in support of the Appellant, Wisconsin Department of Revenue, and ask this Court to reverse the decision of the Wisconsin Supreme Court. Because this brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. U.S. Sup. Ct. R. 37.5.

II. INTEREST OF AMICI CURIAE

At issue in this case is the proper interpretation of a federal statute commonly referred to as Public Law 86-272 (codified at 15 U.S.C. § 381). This federal statute restricts a state's right to impose a net income tax, as defined in 15 U.S.C. § 383, on income derived within such state and, therefore, is applicable to the Amici because they impose such taxes.

The signatory Amici states impose either net income taxes or franchise taxes measured by net income which are implicated by P.L. 86-272. The Amici believe that the Wisconsin Supreme Court's decision in this case incorrectly interprets P.L. 86-272. They desire a decision from this Court as to the proper legal standards to be employed in application of the statute.

III. RELEVANT STATUTE

Public Law 86-272 (15 U.S.C. § 381) provides, in relevant part:

Minimum Standards

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the *solicitation of orders* by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Domestic corporations: persons domiciled in or residents of State

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to –

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Sales or solicitation of orders for sales by independent contractors

(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

Definitions

(d) For purposes of this section –

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

(emphases added).

IV. SUMMARY OF ARGUMENT

The Wisconsin Supreme Court erroneously interpreted Public Law 86-272 in such a way that it immunizes from a state net income tax an out-of-state company which does almost anything and everything in a state except own certain types of physical facilities in the state. In enacting P.L. 86-272, Congress did not intend to so drastically restrict states' right to impose taxes. The plain language of the statute immunizes only those companies whose *"only* business activities" are the "solicitation of orders." The orders must be approved or rejected out-of-state and filled by shipment or delivery from out-of-state. The statute cannot properly be interpreted so broadly as to immunize all activities "closely associated and inextricably bound up with 'solicitation of orders' " or to immunize de minimis nonsolicitation activity. The legislative history of the statute supports the narrow construction of the statute, consistent with the common ordinary meanings of "only" and "solicitation of orders."

The standards adopted by the Wisconsin Supreme Court lead to uncertainty for taxpayers and tax administrators. In contrast, the pre-sale/post-sale test is a definite standard with the benefits of predictability and certainty. It immunizes those customary or generally accepted acts which lead to the placing of orders, but not those acts which occur as a result of prior sales or other acts (such as training) which may have an impact on future orders.

The broad interpretation of "solicitation of orders" adopted by the Wisconsin Supreme Court results in consequences never intended by Congress. It causes an

extreme and unfair loss of revenue for the taxing states, especially consumer states. Also, local business suffers a competitive handicap because it must pay more tax to make up for the lost tax base. The typical small business paying tax to its state of domicile will not be able to compete with large multistate operators who pay no state income tax where they sell their products. The statute does not clearly dictate these unfair consequences.

V. ARGUMENT

This is a statutory construction case involving a federal statute which immunizes from a state net income tax certain persons who would otherwise be subject to the tax. Public Law 86-272 becomes relevant only if a person's activities in a state (solicitation and nonsolicitation) subject that person to the state's net income tax pursuant to state statutes and taxation is not prohibited by a constitutional provision.[1]

---

[1] Some language of the Wisconsin Supreme Court indicates that the court was thinking in terms of the Commerce Clause. It refers to "a burden on interstate commerce" that "would 'tend to "balkanize the American economy." ' " *William Wrigley, Jr. Co. v. Dept. of Rev.*, 465 N.W.2d 800, 812 (Wis. 1991). It also quoted the dissenting opinion of the Wisconsin Tax Appeals Commission's Order which said that the direct sales made by Wrigley in Wisconsin were not sufficient "to stick jurisdiction on Wrigley." *Id.* at n.5. Clearly, however, under the Commerce Clause, Wrigley is subject to Wisconsin's income tax. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

The Wisconsin Supreme Court stated that when analyzing a claimed immunity under 15 U.S.C. § 381 (the codification of P.L. 86-272), "a court should look at whether the activities are closely associated and inextricably bound up with 'solicitation of orders.' " *Wrigley*, 465 N.W.2d at 811. The court further stated that courts should analyze deviations from the norm and "de minimis" nonsolicitation activities to see if they reach a sufficient level of activity to result in loss of immunity. *Id.* It also stated that courts should look at what is ***not done*** in a state in deciding whether activities done are "solicitation of orders." *Id.*

The standards adopted by the Wisconsin Supreme Court are inconsistent with the plain language of the statute and are not supported by the statute's legislative history. Application of the Wisconsin Supreme Court's standards will result in a great deal of uncertainty on the part of taxpayers and tax administrators, as well as causing dire consequences for the states and their domestic corporations which were never intended by Congress when it enacted P.L. 86-272.

As this Court pointed out in a case involving § 381, " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.' " *Heublein v. South Carolina Tax Commission*, 409 U.S. 275, 281-82 (1972), *quoting United States v. Bass*, 404 U.S. 336, 349 (1971). Therefore, § 381 should not be interpreted to restrict the traditional state power to impose taxes any more than is consistent with the clear language of the statute. Moreover, § 381 is a tax exemption statute. It should, therefore, be construed strictly against the assertions of the taxpayer and in favor of the

taxing power, with the taxpayer having the burden of clearly establishing the right to an exemption. 3 Norman J. Singer, *Sutherland Statutory Construction* § 63.08 (Sands rev. 4th ed. 1986). "As explained in court opinions: 'Exemptions from taxation claimed under legislative acts should be rigidly construed and established beyond a reasonable doubt. It is only where a deliberate purpose of the legislature to grant an exemption is expressed in clear and unequivocal terms that a claim to an exemption can be maintained.' " 3A Norman J. Singer, *Sutherland Statutory Construction* § 66.09 (Sands rev. 4th ed. 1986) (footnote citations omitted).

If Congress had intended to immunize Wrigley's Wisconsin activities consisting of picking up products, disposing of products, training, stocking displays, rental of storage space, delivery of products from car stock, and managerial activities, it certainly could, and would, have used words with a broader reach than "solicitation of orders." Congress did not say "solicitation of orders and activities incidental to solicitation." It did not say "business activities." It did not say "activities closely associated and inextricably bound up with solicitation of orders." All activities of all out-of-state (and all in-state) merchants are directed toward ultimately increasing sales, whether they be "solicitation" or nonsolicitation. Congress did not, however, state that nonsolicitation activities that could increase sales were covered by the tax immunity in P.L. 86-272 or that out-of-state merchants could not be required to pay state income tax. The fact that Wrigley's activities in Wisconsin may "eventually result in increased orders . . . does not blanket all [Wrigley] activities with the protection afforded by [P.L.

86-272]." *Clairol, Incorporated v. Kingsley*, 262 A.2d 213, 218 (N.J. Super. Ct. App. Div. 1970), *aff'd*, 270 A.2d 702 (N.J. 1970), *appeal dismissed for want of a substantial federal question*, 402 U.S. 902 (1971).

The language of P.L. 86-272 does not allow a company to be immune from a state's net income tax if its nonsolicitation activities are "de minimis." "Public Law 86-272 provides for no 'exceptions' to the solicitation only requirement for the statute to provide an exemption from taxation." Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 384-85 (1976). Public Law 86-272 expressly exempts from a state's net income tax a corporation whose *"only* business activities" within the state are the "solicitation of orders." The term "only" means "nothing else or more." Black's Law Dictionary 982 (5th ed. 1979). Even an isolated activity beyond the scope of "solicitation" precludes P.L. 86-272 tax immunity. This view is supported by legal commentators who have criticized those courts which have said that de minimis nonsolicitation activity does not preclude immunity. *See* Philip M. Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 294, 305 (Winter 1985) ("This de minimis definition of solicitation is without legislative support."); Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 381 (1976) ("[I]t is most difficult to believe that the de minimis doctrine properly has any application whatsoever in this type situation."). This particular case does not involve an isolated activity beyond solicitation of orders. There are a multitude of

nonsolicitation activities by Wrigley employees in Wisconsin. Any ***one*** of those activities is sufficient to preclude tax immunity. "[I]t is not the quantity of activity that determines whether the federal statute is a shield against state income tax liability. The statutory prohibition on taxation is determined by the quality of the activity; specifically, activity which is limited to the solicitation of the sale of tangible personal property." *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 670 (Mo. banc 1990). It is "not the frequency of the visits or volume of sales" which is important, but "the *nature* of [Wrigley's] activities." *U.S. Tobacco Co. v. Martin*, 801 S.W.2d 256, 260 (Ark. 1990).

"The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959)." *Heublein*, 409 U.S. at 279. *Northwestern States Portland Cement* involved two separate appeals consolidated for decision. The normal, limited meaning of "solicitation" is made apparent by its use in the Court's statement of facts concerning the second company:

> Respondent's salesman carried on the usual sales activities, including regular solicitation, receipt and forwarding of orders . . . and the promotion of business and goodwill for respondent.

358 U.S. at 456. Solicitation of orders is only one aspect of "sales activities"; promotion of business and promotion of goodwill are separate aspects. The Supreme Court used "solicitation" in its common and ordinary sense. It must be presumed that Congress, reacting to the Court's language, did likewise.

The plain language of § 381 is sufficient to settle the questions presented in this case. Therefore, the statute's legislative history should only be looked at to determine whether there is a clearly expressed legislative intention contrary to the statutory language which would require the Court to question the strong presumption that Congress expresses its intent through the language it chooses. *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). The legislative history of § 381 does not show a legislative intent contrary to the statutory language. In fact, "[t]he legislative history of § 381 shows that Congress had rather *limited purposes*. . . ." *Heublein v. South Carolina Tax Commission*, 409 U.S. 275, 279 (1972) (emphasis added). It strongly supports the narrow construction of "solicitation of orders."

In *Heublein*, 409 U.S. at 279-80, the Court stated:

> The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 U.S., at 452. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub. L. 86-272, 73 Stat. 555, 15 U.S.C. § 381, within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that *"mere solicitation"* would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal.*

(footnotes omitted; emphases added).

The Wisconsin Supreme Court's interpretation of § 381 does not "define clearly a lower limit" for the exercise of the state's power to tax or "remove uncertainty" for businessmen or for tax administrators. Under the Wisconsin Supreme Court's standards, one must determine whether activities are sufficiently "closely associated and inextricably bound up with 'solicitation of orders.' " *Wrigley*, 465 N.W.2d at 811. Also, for those activities recognized even by the Wisconsin Supreme Court as nonsolicitation activities, one must determine whether the amount of nonsolicitation is greater than "de minimis." *Id.* These standards are fraught with uncertainty. Is replacement of a product (such as stale or damaged gum) immunized but not repairs? One court that adopted a broad interpretation of "solicitation" indicated that repairs would not be immunized. *Gillette Co. v. State Tax Commission*, 393 N.Y.S.2d 186, 191 (N.Y. App. Div. 1977), *aff'd*, 410 N.Y.S.2d 65 (N.Y. 1978). How are repairs significantly different from replacing the product? If company personnel do ***only*** complaint handling, is the activity not "solicitation" and not immunized? If while at a

customer's location doing complaint handling, the company representative also solicits another order, does the complaint handling then become "solicitation?" How will business people or tax administrators know where to "draw the line" when considering which activities are closely associated and inextricably bound up with solicitation of orders or how much nonsolicitation is beyond the de minimis level? Apparently, the Wisconsin Supreme Court considered almost everything the Wrigley sales representatives and their managers did in Wisconsin to be within the tax exemption. It did indicate that it would not view the occasions when credit problems were looked into as being part of solicitation. *Wrigley*, 465 N.W.2d at 811. But why would disposing of stale gum in Wisconsin landfills be any more closely associated with solicitation of orders than is looking into credit problems? The Wisconsin Supreme Court stated that the type of business and the manner in which its products are sold must also be considered. *Id.* at 812. Do tax administrators have to become experts on how different types of products are sold by different types of businesses? Who decides what is customary for a particular type of business or product?[2]

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[2] Public Law 86-272 does not apply to a company which sells a ***service***, as compared to tangible personal property, so why assume every company which sells tangible personal property must be able to come within the statute's protection? "[M]any businesses, by their very nature, cannot claim the benefits of the federal statute. . . . " *Olympia Brewing Co. v. Dept. of Rev.*, 5 Or. Tax 99, 110 (Or. T.C. 1972), *aff'd*, 511 P.2d 837 (Or. 1973), *cert. denied*, 415 U.S. 976 (1974). In *Heublein*, the type of business and the manner of sales for a liquor manufacturer in South Carolina were such that liquor manufacturers could never qualify for P.L. 86-272 tax immunity. 409 U.S. at 279.

In contrast to the uncertainty created by the standards adopted by the Wisconsin Supreme Court, the pre-sale/post-sale test is a definite and efficient standard to apply in determining whether an activity constitutes "solicitation of orders." The Wisconsin Supreme Court even recognized that "the pre-sale/post-sale test may produce consistency and predictability." *Wrigley*, 465 N.W.2d at 809. It immunizes the customary or generally accepted acts which lead to the placing of orders, but not those acts which occur after a sale has been made. Activities done before the sale which are attempts to get a prospective customer to order the product being sold are within P.L. 86-272 immunity. Examples of such pre-sale activities include demonstrating how the product works, answering questions regarding pricing or warranties, leaving product brochures or samples to be tried by the prospective customer, or even telling the prospective customer how the product might be resold if the customer purchased it. Once the sale has been made, however, the post-sale activities are not included in "solicitation of orders." Picking up or disposing of damaged or outdated products, making repairs or replacing product, handling complaints with respect to product defects or regarding billing or delivery, stocking displays or shelves, and training or advising the customer regarding merchandising of products already purchased are examples of activities which are done in connection with ***prior*** sales, i.e., as a result of earlier solicitations of orders. Although they may promote business or goodwill, they are not part of the "solicitation of orders." They relate to "maintaining an on-going business operation" and "help[ing] run [customers'] businesses," which are not

immunized by P.L. 86-272. *National Tires, Inc. v. Lindley*, 426 N.E.2d 793, 798 (Ohio Ct. App. 1980). Public Law 86-272 does not immunize every activity which may affect future sales in some way. Managerial activities, such as training and evaluating sales representatives, may affect future sales, in that better trained employees should make more sales. There is no reason, however, why Wrigley must train its employees in Wisconsin in order to solicit orders there. Indeed, managerial activities do not even directly involve the prospective customer.

In *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972), the taxpayer was required by South Carolina statutes regulating intoxicating liquor to send its products to its local representative in South Carolina who then transferred the products to a local wholesaler which had placed orders with the taxpayer at its out-of-state home office. "This transfer occurred within the State and clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of § 381." *Id.* at 279. Because the in-state transfer was required by South Carolina as a condition of conducting business within the state, it could be said to be closely associated and inextricably bound up with "solicitation of orders." If the in-state transfer was not done, orders could not be solicited in South Carolina. Yet, this Court held that such activity was not solicitation under P.L. 86-272. The Wisconsin Supreme Court's interpretation of P.L. 86-272 is plainly inconsistent with *Heublein*. The fact that the type of product, the level of competition and the level of sales desired may require that Wrigley employees do certain activities does not cause those activities to be immunized by P.L. 86-272.

Wrigley does not even satisfy the statutory requirement that orders be approved outside the state and filled by shipment or delivery from a point outside the state. Wrigley sales representatives conducted "agency stock checks." *Wrigley*, 465 N.W.2d at 804. They used car stock, carried as inventory on Wrigley's books, to fill in empty spots on retail shelves or stands, so that the retailer would not have to wait for delivery from a wholesaler. Wrigley's Chicago office then billed the wholesaler who, in turn, billed the particular retailer. The wholesaler also replaced the sales representative's supply of product with the amount which had been left with a retail account. *Id.* This activity constituted acceptance of an order and delivery within Wisconsin. The representative did not obtain approval from anyone outside Wisconsin each time he left gum with an account, for which the account was ultimately billed. This transfer of product within the State "clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of § 381." *See Heublein*, 409 U.S. at 279.

By having their stock of gum replenished by in-state wholesalers, Wrigley representatives were able to operate just as effectively as if Wrigley maintained its own stock of goods within Wisconsin. As the Wisconsin Supreme Court recognized (465 N.W.2d at 807), immunity is not provided if the company maintains a warehouse or stock of goods within the state. S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548. The Wisconsin Supreme Court dismissed Wrigley's rental of "storage space in a warehouse" as not being "the size or type of warehouse" not immunized by § 381. *Wrigley*, 465

N.W.2d at 805, 812. Do tax administrators now have to do further guessing and line drawing to determine when a company's in-state warehouse is of the type and size which allows the state to impose a net income tax on the company? Also, when is an in-state office not the type and size of office which causes a company to lose its § 381 immunity? Two Wrigley regional sales managers lived in Wisconsin and worked out of their homes. Wrigley provided the file cabinet for the "in-home office." *Wrigley*, 465 N.W.2d at 805. "[I]n actuality the homes of these [employees] were used as corporate offices. Despite their label as 'homes' they served the corporation just as effectively as 'offices'." *See General Motors Corp. v. Washington*, 377 U.S. 436, 447 (1964), *overruled on other grounds, Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. 232 (1987). A provision of P.L. 86-272 which would have immunized the maintenance of a "sales office" within the state was stricken by an amendment prior to enactment. *See* 105 Cong. Rec. 16470 (1959); S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548.

The overly broad interpretation of "solicitation of orders" adopted by the Wisconsin Supreme Court "not only results in unfair loss of revenue to the taxing States, but local business suffers a competitive handicap since it must shoulder the tax burdens which the out-of-state seller has unfairly escaped by reason of Public Law 86-272." Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 9:14, at 517-18 (1981). The broad interpretation used by the Supreme Court of Wisconsin allows an out-of-state company to do practically anything in a state that a local company would do (generating greater income than could be made simply through solicitation of

orders), and benefit from the same state services as the local company, but not pay any tax to the state to help pay for those services. The local company is not protected by P.L. 86-272, and if the state cannot tax out-of-state companies, local companies have to carry a greater share of the tax burden. The typical small business, domiciled in and taxed upon its profits by a state, will not be able to compete with a large multistate operator who pays no state income taxes where he sells his products.

Remarks made by Senator Byrd, sponsor of the bill (S. 2524, 86th Cong., 1st Sess. (1959)) which, after amendment, was passed as P.L. 86-272, support the narrow view of what restrictions the statute places on states' power to impose income taxes. Near the end of the senate debate on S. 2524, after the relevant amendments had been made, Senator Byrd stated:

> Mr. President, all in the world the bill would do is to say that business which originates from the solicitation of a *traveling salesman, who does not have an office* and who does not have any facilities whatever, except perahaps (sic) his own automobile or his own legs, which business originates in one State when title is transferred in another State, since the sale is not consummated in the State involved, is business which shall not be taxed, as interstate commerce, in regard to income taxes. That is all the bill would do. It has been stripped down to the point that that is *the only thing the bill would do.*
>
> . . . .
>
> Let me say a word about small business. The Senator from Alabama is interested in the protection of small business. *Big business can get*

> *orders by advertising* over the television and in the newspapers. Big business concerns spend millions of dollars advertising on the television and in newspapers. Frequently the small businessman must send a salesman in to get the business.
>
> What about the orders which are obtained by mail order houses? Should such transactions be taxed? The *mail order houses send a booklet into the State,* and the recipient notes from that book what he wants to buy. *All that the small businesses can do is to send in salesmen. They have no office. They do no business in the State, except to solicit orders.*

105 Cong. Rec. 16493-16494 (1959) (emphases added).

The committee report which accompanied S. 2524 stated:

> Consequently, if the only business presence within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed.

S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548, 2553.

There are no statements in legislative committee reports regarding S. 2524 or made during the congressional debates which support the interpretation of P.L. 86-272 adopted by the Wisconsin Supreme Court. There are no statements that activities incidental to or closely associated with solicitation are protected by P.L. 86-272. There are no statements that the statute protects any activity which is a customary activity ultimately increasing sales or that some amount of nonsolicitation activity is protected.[3]

Taxpayers arguing in favor of a de minimis exception to P.L. 86-272 sometimes cite to the Willis Report (H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964)), which refers to certain activities not immunized by P.L. 86-272 as being "usual or frequent." This report was written by a subcommittee of the House Judiciary Committee in 1964, five years after P.L. 86-272 was enacted. The subcommittee's interpretation of a statute enacted five years earlier is not part of the legislative history of the statute and should not be given any weight in ascertaining the legislative intent when the statute was passed. 2A Norman J. Singer, *Sutherland Statutory Construction* § 48.06 (Sands rev. 4th ed. 1984); *Secretary of Interior v. California,* 464 U.S. 312, 330 n.15 (1984).

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[3] There are statements made in committee reports or debate regarding the need for an office, salable inventory, warehouse, or other place of business in the state in order for a company to lose its immunity. Such statements are, however, clearly erroneous. Bills introduced in Congress which would have prevented states from imposing an income tax on a business unless it maintained an office, salable inventory, warehouse or other place of business, or had an agent who maintained an office or other place of business in the state were rejected. *See* H.R. Rep. No. 936, 86th Cong., 1st Sess. (1959) (reporting H.J. Res. 450); S.J. Res. 113, 86th Cong., 1st Sess. (1959).

VI. CONCLUSION

Public Law 86-272 immunizes from an otherwise proper state net income tax those companies whose "only" activities in the state are the "solicitation of orders." There is no exception for de minimis nonsolicitation. "Solicitation of orders" includes only those pre-sale activities which are customarily done in order to persuade a prospective customer to order the product being sold. It does not include post-sale activities, such as dealing with previously sold product or handling complaints related to prior sales. It also does not include activities, such as management and training, which do not even directly involve the prospective customer.

The Amici urge this Court to reverse the decision of the Wisconsin Supreme Court. That decision applied an unreasonably broad interpretation of P.L. 86-272's restrictions on state taxing power which is not supported by the plain language of the statute or by the statute's legislative history.

Respectfully submitted,

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